

R.D. # 0016-01  
Newark, NJ

UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
REGION 22

**PUBLIC SERVICE ELECTRIC  
AND GAS COMPANY<sup>1</sup>**

Employer

and

**CASE 22-RC-12139**

**INTERNATIONAL BROTHERHOOD  
OF ELECTRICAL WORKERS,  
LOCAL 94, AFL-CIO**

Petitioner

**DECISION AND ORDER**

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, herein called the Act, a hearing was held before a hearing officer of the National Labor Relations Board, herein called the Board.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned.

Upon the entire record in this proceeding<sup>2</sup> the undersigned finds:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

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<sup>1</sup> The name of the Employer appears as amended at the hearing.

<sup>2</sup> Post-hearing briefs filed by the parties have been fully considered.

2. The Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein<sup>3</sup>.

3. The Petitioner is a labor organization within the meaning of Section 2(5) of the Act.<sup>4</sup>

4. No question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(3) and Section 2(6) and (7) of the Act, for the following reasons:

The Employer supplies electric and gas service to customers located throughout most of the State of New Jersey. The Petitioner represents approximately 3,900 of the Employer's employees, which includes those who are involved in the generation, transmission and distribution of electric services as well as a separate unit of employees who are involved with the Employer's gas operation. The most recent collective bargaining agreement between the parties covering the electric operation is effective from May 1, 1996 through April 30, 2002.

The Petitioner seeks to represent the Employer's approximately 9 Revenue Integrity Investigators, herein RIIs, either as a separate unit or as a part of its currently represented unit of electrical employees. The Employer maintains that

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3 The Employer, a New Jersey corporation, is engaged in the operation of a public utility providing gas and electric services from its Newark, New Jersey facility and various branches located throughout the State of New Jersey.

4 The parties stipulated and I find that the Petitioner is a labor organization within the meaning of Section 2(5) of the Act.

RIIs are guards within the meaning of Section 9(b)(3) of the Act and the Petitioner cannot represent them as a separate unit because it admits to membership employees other than guards. The Employer also maintains that the Board should not include the RIIs in a unit with the other electrical employees because the Act does not permit a unit which includes both guards and nonguards.

#### **A. Background**

The record reflects that prior to 1975 the Employer employed individuals classified as Investigators who were represented by the Utility Coworkers' Association, herein called UCA. After 1975 until about 1984, however, that position remained vacant. In about 1984 the Employer created a new classification of Energy Diversion Investigator (EDI), currently known as RII, which classification was to replace the Investigator category, with its occupants having better training and broader authority. The Employer then filed a Petition with the Board (Case 22-UC-114) seeking to clarify the unit represented by UCA to exclude the EDIs as guards. Following an administrative investigation, a Decision and Order issued on April 5, 1984, finding EDIs to be guards within the meaning of the Act and ordering that the existing UCA represented unit be clarified to exclude them. The Decision and Order noted:

The investigation also revealed that the Energy Diversion Investigator has independent authority to initiate investigations; to gather and preserve evidence; to physically disconnect meters, piping or unauthorized equipment where diversion is verified; to prepare reports and conduct investigations as to potential perpetrators of the diversion; to maintain photographic and physical evidence of the diversion; to interview witnesses and customers; and to testify in court. Previously, it was necessary for a representative of the Transmission and Distribution Department [footnote omitted] to assist the Investigator in

making an investigation. Currently, however, the investigations are performed independently by the Energy Diversion Investigators.

### **B. Positions of the Parties**

The Employer maintains that the record developed in the instant matter does not establish that the facts pertaining to RIIs, formerly known as EDIs, have materially changed since 1984 and that there is no reason for the Board to change its conclusion that they are guards. The Petitioner argues that the previous finding as to the guard status of EDIs was made administratively without an evidentiary hearing, was based on incomplete and insufficient evidence and is not binding on it since it was not a party to that proceeding. Further, the Petitioner maintains that the evidence elicited in this hearing establishes that RIIs are not guards within the meaning of the Act.

### **C. Facts**

The record reveals that RIIs work in the Revenue Integrity Department and are each assigned a different geographic territory to cover. The department's mission, as stated in its manual, is to prevent, identify and correct all meter conditions causing potential loss of revenue. These conditions may have been deliberately created, such as by meter tampering or other actions causing theft of service, or they may occur inadvertently because of defective meters, incorrect multipliers or human error.

RIIs follow through on leads that are received in their department from a variety of sources. Leads usually are received from employees outside of the department such as meter readers, collectors, meter technicians or troubleshooters. Sometimes leads are also received from neighbors or anonymous tips. RIIs also

initiate their own leads of suspected theft based upon their understanding of energy theft and the types of businesses or residential customers caught stealing in the past as well as reviewing data of significant declining energy use. The record reflects that the RIIs check about 400 to 600 leads a month of which about 60 percent are substantiated. Of those cases where energy loss is substantiated, about 20 percent are attributable to inadvertent causes.

During their investigations, RIIs inspect customers' meters in the field. When theft is suspected, they look for evidence of tampering or misuse. This evidence could be of internal tampering with the meters, bypassing of the meters or of other forms of theft. They also photograph the observed condition and obtain and mark evidence. RIIs also interview witnesses and customers, if necessary. They may change meters or direct their removal and install devices to deter future attempts at theft. These may include new meter seals and security locking devices. They will also document the steps taken during their investigations from beginning to end.

Evidence relating to an investigation, after being marked and documented, is safeguarded by RIIs in a repository. The repository is a locked storage area used solely for the preservation of case evidence. Evidence stored there includes meters, wiring and any other material that supports a theft case. Meters retained for evidence, after being logged, are forwarded by the Revenue Integrity Department to a meter shop for testing, after which they are returned to the repository. RIIs document and control the flow of evidence between the repository and the meter shop. At all times

RIIs are responsible for ensuring that a proper chain of custody for the evidence is maintained.

With respect to the work performed by RIIs in the field, the record discloses that in the performance of their duties they perform “hands-on” work of the type that is also performed by other represented employees, such as meter technicians. Examples of this type of work include rewiring enclosures and changing or repairing meters. RIIs may also have occasion to work with other employees in the field who would provide technical assistance to them in correcting certain conditions.

When incidents of electrical diversion are uncovered, it is common to also find safety hazards such as exposed or undersized wires that may overheat. Diversion of gas also often creates hazardous conditions that may lead to explosions. RIIs’ duties include correcting these hazardous conditions, when discovered, or arranging to have them corrected.

RIIs enter information they gather into a computer database. Reports they prepare confirm whether or not there have been diversions of energy. In theft cases, they also determine, if possible (after checking a database showing the customer’s history of usage), when the theft began and when it ended. RIIs then send their reports to the billing department, which calculates what to bill the customer based on the RIIs’ findings and recommendations. The investigative information they gather may also be used for purposes of criminal prosecution.

An unmarked vehicle is assigned to each RII for transportation to and from his or her assigned territory to conduct investigations. The vehicles are unmarked

because of the need to make unannounced visits to customers for investigations and to ensure the safety and protection of the RII. RIIs are not provided with any weapons. They also do not wear any guard-type uniforms or badges. RIIs are instructed to avoid physical force.

RIIs receive technical training in various aspects of their work similar to that received by other represented employees. Additionally, RIIs receive specific training and attend seminars with respect to investigative techniques, preserving evidence and preparing reports.

The Employer's "Standards of Integrity" policy given to all employees provides, *inter alia*, that "it is the responsibility of each of us to safeguard [the Employer's] assets to prevent their abuse, unauthorized personal use, loss or theft." The Employer has also instituted an Employee Incentive Award Program for all of its employees (except those in the Revenue Integrity Department) to encourage them to report possible cases of energy diversion. The program is administered by RIIs who periodically conduct training sessions with field employees from the various operating departments and review common forms of tampering. They also review ways employees can identify and report suspicious conditions, including incentive and non-incentive procedures.

At times the investigations by RIIs uncover instances of theft of services by the Employer's own employees.<sup>5</sup> In such instances, RIIs report this fact to their

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<sup>5</sup> Many of the Employer's employees are also customers of the Employer as they reside within the geographic area serviced by the Employer.

supervisor who in turn notifies the Corporate Security Services (CSS) Department, a separate department which performs security services for the Employer. RIIs' investigations then continue in coordination with CSS. The record reflects that in the past three years, there have been about four employees investigated. RIIs have, at times, been called upon to testify in court against customers, including employees of the Employer, with respect to energy diversion. The record reveals that employees who have been found to be engaged in energy diversion have been terminated by the Employer.

The Petitioner introduced evidence that equivalent classifications to RIIs employed at four other utilities are included in units there with non-guards.<sup>6</sup> Based thereon, the Petitioner maintains that an industry-wide practice exists to include such employees in collective bargaining units with other employees. No evidence was introduced that the Board certified any of these units.

#### **D. Analysis**

Section 9(b)(3) of the Act prohibits the Board from certifying for collective bargaining purposes a unit of employees that includes both guards and nonguards. This section defines a guard as "any individual employed...to enforce against employees and other persons rules to protect property of the employer or to protect the safety of persons on the employers premises." When an employer assigns employees duties that are arguably security-related and other duties that are not, a primary

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<sup>6</sup> Two of these four utilities are located in the State of New York and the others are located in the States of Washington and Nevada.



concern in determining whether the employees are guards is not the percentage of time they spend on the arguably security-related duties but rather the nature of the duties themselves. Therefore, the Board has determined that employees are guards if they are given guard responsibilities that are not a minor or incidental part of their overall responsibilities. *The Boeing Company*, 328 NLRB 128 (1999); *Rhode Island Hospital*, 313 NLRB 343 (1993).

In the instant case, a primary responsibility of RIIs is to prevent the Employer's property, that is, its gas and electric energy, from being diverted. An important aspect of preventing such diversion is the investigation and uncovering of theft of these services. In doing so, RIIs are enforcing against employees and other persons anti-diversion rules to protect the property of their Employer. While much of their time is spent investigating leads that are not substantiated and some of their cases, even when substantiated, do not involve deliberate theft or misuse of Employer property, I find that the RIIs' work involves dealing with theft of services and enforcing the employer's rules against such theft, to an extent that cannot be described as being merely a "minor or incidental part of their overall responsibilities." *The Boeing Company*, supra at 130; *Rhode Island Hospital*, supra at 347. While other employees are also charged with reporting observed incidents of theft, that function for such employees is clearly a minor and incidental part of their job duties. Additionally, the fact that RIIs in the field may engage in work of a type also performed by unit employees is immaterial and does not negate a finding that they are guards. Further, although few of the incidents of theft uncovered by RIIs involve

employees, the fact that the employees are aware of the presence of RIIs (whose duties include investigating and reporting incidents of theft) would perforce deter them from engaging in such activities.

Although RIIs do not possess some of the traditional indicia of guard status such as uniforms, badges or weapons and they do not perform traditional guard functions such as patrolling their employer's premises, I find that these factors would not preclude them from being found to be guards. In this regard, in *Burns Security Systems, Inc.*, 188 NLRB 222 (1971), the Board found Complaints and Survey Sergeants to be guards. The Sergeants there, who dressed in civilian clothes and rode in unmarked vehicles, investigated incidents of thefts and motor vehicle accidents and filed reports thereon. The Board noted that their duties were "part and parcel of the statutorily described functions of enforcement of rules to protect property and safety of persons." The Board also noted that:

....the basic policy reasons for requiring guards to be represented in separate units and by separate unions are directly applicable to employees who perform duties of the nature here involved. The potential conflict of interest between these employees and the employees whose illegal activities they are attempting to ferret out is plainly present, and in just as significant degree as in the case of guards who are empowered to physically restrain other employees who engage in or are attempting to engage in such illegal activities.

Id at 223; *The Broadway*, 215 NLRB 46 (1974) [fitting room checkers found to be guards].

In *The Wackenhut Corporation*, 196 NLRB 278 at 279 (1972), the Board found security toll operators to be guards who enforce against persons seeking to use the expressway rules to protect property and the safety of the persons on the

expressway's premises. Noting that they do not have the power of police to ultimately determine and compel compliance by violators of the expressway rules, the Board found it sufficient that they "possess and exercise responsibility to observe and report infractions, as this is an essential step in the procedure for enforcement of the highway rules [footnote omitted]." Similarly, in the instant case, RIIs perform functions that are an essential part of the Employer's enforcement of its anti-diversion and theft policies.

Similarly, in *Defender Security & Investigation Services, Inc.*, 212 NLRB 407 (1974), the Board found that on-premises undercover investigators were properly included in a unit of uniformed security guards. These investigators were retained to work at the premises of their employer's client to determine which customers and/or employees were responsible for property damage or thefts. For example, a department store might assign an investigator to its fitting room to identify customers attempting to leave the store wearing merchandise they had not purchased. Also, a manufacturer or construction firm might assign an investigator to its production floor or a construction crew to discover which employees were stealing or sabotaging equipment. For obvious reasons, the investigators did not wear uniforms. By including them in a unit with uniformed security guards, the Board noted that they shared a common job function, namely, the protection and security of the client's property. *Id.* at 407-408.

Based on the above and the record as a whole, noting the guard-like duties that RIIs perform are not a minor or an incidental part of their overall responsibilities and

that they enforce against employees and customers rules to protect the Employer's property, I find that RIIs are guards within the meaning of the Act. Accordingly, I shall issue the following Order:

**ORDER**

It is hereby ordered that the petition filed herein is dismissed.

**RIGHT TO REQUEST REVIEW**

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, D.C. 20570-0001. This request must be received by the Board in Washington by November 20, 2001.

Signed at Newark, New Jersey this 6<sup>th</sup> day of November 2001.

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